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EDWARD MAKARON

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EDWARD MAKARON, on behalf of himself and all others similarly situated, Plaintiff, v. ENAGIC USA, INC., Defendant.	Case No. 2:15-cv-05145-DDP-E **JOINT RULE 26(f) REPORT** Rule 26(f) Scheduling Conference: Date: March 13, 2017 Time: 10:00 a.m. Ctrm: 3

Plaintiff Edward Makaron ("Plaintiff") and Defendant ENAGIC USA, INC. ("Defendant") hereby submit their Joint Rule 26(f) Report. The Report includes all information required by Fed. R. Civ. P. 26, L.R. 26-1, and this Court's Order Setting Scheduling Conference for March 13, 2017.

A. STATEMENT OF THE CASE

Plaintiff's Position:

Plaintiff alleges that beginning in or around May of 2015, including on May 18, 2015, Defendant contacted Plaintiff on his cellular telephone, (310) 210-3272, from Defendant from telephone number 469-340-4080, in an attempt to sell Plaintiff Defendant's services and recruit him into Defendant's network of third party Distributors. First Amended Complaint, Dkt. No. 15. ¶¶ 6-8 (hereinafter "FAC"). The content of the call was a 22 minute prerecorded message, sent via a robo-dialer, during which Defendant's agent sought to enlist Plaintiff as a Distributor for Enagic, to expand the scope of Defendant's widely publicized pyramid scheme sales model. *Id*. at ¶ 7. During the 22 minute prerecorded infomercial-style pitch, Defendant's representative specifically referenced working for Enagic, selling its alkaline water filtration systems, and informing Plaintiff that he would receive as part of his enlistment package, access to Defendant's robo-dialing tool, which was being used to contact Plaintiff, as well as a "list" of potential customers towards whom he could place such calls to make his own pitches. *Id*. This 22 minute prerecorded infomercial-style robo call facially appears to be part of a standardized and widespread advertising campaign. *Id*.

Plaintiff alleges that he received a call in the following days from an individual identifying himself as a representative of Enagic, who engaged in further efforts to recruit Plaintiff to Defendant's sales force. Defendant's representative sent Plaintiff an email containing various materials from Defendant regarding its alkaline water machines, and how to become a distributor of these machines working for Defendant. *Id*. at 8. Plaintiff alleges that Defendant utilized an "automatic telephone dialing system", as defined by 47 U.S.C. § 227(a)(1) ("ATDS"), in order to place the automated and prerecorded robo calls to Plaintiff. *Id*. at ¶ 9. Further, Plaintiff has never been a customer of Defendant's services and never provided any personal information to Defendant. Thus, Defendant never received Plaintiff's "prior express consent" to receive calls using an automatic telephone dialing system or an artificial or prerecorded voice on his cellular telephone pursuant to 47 U.S.C. § 227(b)(1)(A). *Id*. at ¶ 12.

Defendant's Position:

Enagic is a direct selling company that markets various products and services through a network of thousands of independent distributors who reside and operate in most states. All of Enagic's independent distributors are independent contractors, and as such, they have broad discretion to determine their own methods of sale and means of securing customers, so long as those methods and means are consistent with Enagic's formal Policies and Procedures.

Enagic does not use ATDS or prerecorded voice calls to solicit potential customers, independent distributors, or any other individuals who have not consented to receiving communications from Enagic. Nor does Enagic direct or encourage its independent distributors to use ATDS or prerecorded voice calls to solicit potential customers or independent distributors. In fact, Enagic's Policies and Procedures expressly prohibit independent distributors from using Enagic's name or copyrighted materials in connection with "automatic calling devices or 'boiler room' operations either to solicit independent distributors or retail customers."

To the extent Enagic's independent distributors choose, in their discretion, to contact potential customers or independent distributors by telephone, Enagic does not provide them with telephone numbers or other information regarding potential customers or independent distributors, nor does Enagic participate in any way in obtaining that information. Rather, Enagic's independent distributors acquire potential customers' and independent distributors' telephone numbers and other contact information independently from various sources under a variety of different circumstances. Enagic also does not provide its independent distributors with ATDS, prerecorded voice recordings, or any other telephonic technology, nor does Enagic instruct its independent distributors regarding the use of such technology. Finally, Enagic does not possess, maintain, or have access to records of any telephone calls that its independent distributors might have made to potential customers or any other third parties. If any such records exist, they would be possessed and maintained separately by each independent distributor.

Enagic denies that it used an ATDS or pre-recorded voice to call Plaintiff's cellular phone. To the extent one of Enagic's independent distributors or some other individual called Plaintiff's cellular phone, Enagic did not direct, approve, or have knowledge of that call. Enagic further denies that it can be subjected to liability for the conduct of its independent distributors. Contrary to Plaintiff's allegations, Enagic's independent distributors are not Enagic's agents or employees.

B. SUBJECT MATTER JURISDICTION

Federal subject matter jurisdiction exists pursuant to the Class Action Fairness Act of 2005, codified at 28 U.S.C. § 1332(d)(2). Plaintiff alleges to represent a putative class that contains citizens of States different from the State of citizenship of Defendant, and the matter in controversy allegedly exceeds the sum of $5,000,000.00, exclusive of interests and costs. In addition, there is federal subject matter jurisdiction pursuant 28 U.S.C. § 1331 as this case arises under the Telephone Consumer Protection Act, a Federal Statute.

Notwithstanding the foregoing, Defendant contends that the Court lacks subject matter jurisdiction of this case because Plaintiff lacks standing to sue under the TCPA.

C. LEGAL ISSUES

Plaintiff's Position:

The legal issues in this matter include, but are not limited to:

- Whether, within the four years prior to the filing of this Complaint, Defendant or its agents made any calls to the Class (other than a call made for emergency purposes or made with the prior express consent of the called party) to a Class member using any automatic dialing system to any telephone number assigned to a cellular phone service;

- Whether Defendant's dialing system constitutes an ATDS;
- Whether Defendant had Plaintiff's prior express consent to make telephone calls to Plaintiff and Class Members;
- Whether Defendant's activity was systemic;
- Whether Plaintiff's action is fit for class certification;
- Whether Plaintiff and the Class members were damaged thereby, and the extent of damages for such violation; and,
- Whether Defendant and its agents should be enjoined from engaging in such conduct in the future

Defendant's Position:

The legal issues in this matter include, but are not limited to:

- Whether Plaintiff and the putative class members have standing to sue under the TCPA;
- Whether the Court lacks subject matter jurisdiction due to Plaintiff's lack of standing;
- Whether Enagic's independent distributors are independent contractors;
- Whether Enagic can be subjected to vicarious liability for the acts of its independent distributors;
- Whether Plaintiff's action is unsuitable for class certification.

D. PARTIES, EVIDENCE, ETC.

1. Plaintiff

Witnesses: Plaintiff identifies himself and Defendant's Person Most Knowledgeable regarding the equipment used to place calls to Plaintiff and Class members, as well as Defendant's policies and procedures regarding outbound calls made to Plaintiff and the Class members. Plaintiff will also be subpoenaing several Distributors

Documents:

- Documentation regarding the alleged autodialer campaign conducted by Defendant;
- Documentation regarding Defendant's outbound dial list generated by any predictive dialer or ATDS to cell phones;
- Documentation regarding cellular phone numbers that have provided prior express consent to receive calls from Defendant;
- The Plaintiff's phone records; and,
- Documentation regarding the usage of Defendant's ATDS

2. Defendant

Witnesses: At this time, Enagic identifies its President, Koichiro Higa, as a witness who will testify regarding the fact that Enagic does not use ATDS or prerecorded voice calls to solicit potential customers, independent distributors, or any other individuals who have not previously consented to being contacted by Enagic. Mr. Higa will also testify regarding Enagic's policies and procedures, business practices, and its independent-contractor relationship with its independent distributors.

Documents: At this time, Enagic identifies the following potentially relevant documents:

- Enagic's current and former Policies and Procedures;
- Agreements and other documents demonstrating Enagic's independent-contractor relationship with its independent distributors;
- Documentation regarding Plaintiff's relationship and interactions with Enagic or any of Enagic's independent distributors;
- Communications between Plaintiff and Enagic or Enagic's independent distributors.

If the Court permits discovery regarding class certification and the purported claims of the putative class members, Enagic identifies the following additional documents that may potentially be relevant:

- Documentation from each putative class member demonstrating that they received a call from Enagic or one of its independent distributors using an ATDS or pre-recorded voice;
- Documentation from each putative class member regarding his or her consent to receive communications from Enagic or its independent distributors;
- Documentation regarding all other class actions or putative class actions in which Plaintiff was a class member or named representative; and
- Documentation from Plaintiff and each putative class member regarding any injury he or she claims to have suffered as a result of the allegations in this case.

E. **DAMAGES**

Plaintiff's Position:

Pursuant to 47 U.S.C. § 227(b)(1), Plaintiff seeks for himself and each Class member $500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B), and for himself and each Class member $1,500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(C). The realistic range of probable damages is difficult to calculate in light of the allegations of a Class whose size is not yet determined.

Defendant's Position:

Enagic denies that Plaintiff or any putative class member has suffered any injury, and Enagic denies that Plaintiff or any class member is entitled to recover any damages, statutory or otherwise. To the extent Plaintiff or any putative class member is entitled to recover damages, Enagic denies that it can be held liable for any such damages.

F. INSURANCE

The parties are currently unaware of any applicable insurance policies.

G. MOTIONS

Plaintiff:

On June 15, 2016, Plaintiff filed a Motion for Class Certification in order to procedurally preserve Plaintiff's rights pursuant to the decision in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (U.S. 2013), although Plaintiff disagrees that the *Genesis* decision is applicable, and to ensure timely compliance with the deadline set for filing Plaintiff's Motion for Class Certification. Plaintiff respectfully requests the Court defer ruling on such Motion until after Plaintiff has had a reasonable opportunity to conduct pre-certification discovery and is able to supplement the Motion with information obtained during the discovery process.

Plaintiff still needs to conduct class discovery prior to moving for class certification. The Court has only recently set a conference hearing in this case and the parties are just now meeting and conferring pursuant to Rule 26(f). Plaintiff has, thus, not yet served discovery in this case, although Plaintiff certainly intends to issue written discovery and take at least one deposition pursuant to Rule 30(b)(6).

Plaintiff's intentions are to file an Second Motion for Class Certification with information obtained during the discovery process, which information will be necessary to demonstrate the prerequisites of Fed. R. Civ. P. 23(a) are satisfied. With leave of Court, Plaintiff will file an amended Motion for Class Certification with information obtained during the discovery process to further support the prerequisites of Fed. R. Civ. P. 23(a).

In Plaintiff's Second Motion for Class Certification, Plaintiff intends to submit a declaration from Plaintiff's technology consultant/s explaining the process of scrubbing Defendant's possible outbound dial list (which Plaintiff will seek during discovery), to segregate cellular telephone numbers from landline telephone numbers. Plaintiff's technology consultant/s have performed this task in other similar cases. Plaintiff also intends to file Plaintiff's declaration in support of the adequacy of Plaintiff to serve as Class Representative.

Defendant:

Enagic disputes that Plaintiff's Motion for Class Certification is unripe for resolution by the Court. Enagic further disputes that Plaintiff should be permitted to conduct discovery related to class certification before the Court resolves Plaintiff's Motion for Class Certification. For the reasons set forth in Enagic's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Class Certification, Enagic respectfully submits that Plaintiff's Motion for Class Certification and Plaintiff's request to conduct pre-certification discovery should be denied.

As indicated below, Enagic anticipates that it will file a Motion to Dismiss for Lack of Subject Matter Jurisdiction and a Motion for Summary Judgment.

H. MANUAL FOR COMPLEX LITIGATION

This matter is not complex.

I. STATUS OF DISCOVERY

Plaintiff:

Defendant and Plaintiff have not yet initiated Discovery.

Defendant:

Neither party has initiated discovery.

J. DISCOVERY PLAN

Plaintiff: Plaintiff has served written discovery on Defendant. Following Defendant's Plaintiff's written discovery will consist of interrogatories, requests for production, and requests for admissions. Plaintiff needs discovery on the following subjects: Defendant's policies and procedures for conducting the alleged autodialer campaign; Defendant's outbound dial list generated by an predictive dialer or ATDS to cell phones; Defendant's policies and procedures regarding cellular telephone numbers and tracking consent; and Defendant's policies and procedures regarding the usage of Defendant's ATDS. Plaintiff also intends to depose the

Defendant's PMK.

Defendant:

Enagic disputes that Plaintiff has served written discovery in this case.

On or before March 24, 2017, Enagic intends to file a Motion to Dismiss for Lack of Subject Matter Jurisdiction on the grounds that Plaintiff lacks standing under the TCPA. Enagic respectfully submits that the Court should delay the commencement of discovery until that motion is resolved.

In addition, Enagic respectfully submits that an appropriate protective order should be entered before any party is required to produce any documents or other information in discovery. Enagic proposes that the parties agree to an appropriate protective order to be submitted to the Court by March 24, 2017. If the parties cannot agree to a protective order, each party should submit a proposed protective order to the Court no later than March 24, 2017.

Enagic respectfully submits that discovery should be limited to Plaintiff's individual claim and Enagic's defenses to that individual claim, because this case is plainly unsuitable for class certification and Plaintiff has not met his burden of demonstrating what information he expects to obtain in discovery that will support his class allegations.

With this limitation, Enagic proposes that the parties should make the disclosures required by Rule 26(a)(1) by March 24, 2017. Enagic does not believe that any changes are warranted regarding the form or requirement for disclosures under Rule 26(a).

K. DISCOVERY CUT-OFF

Plaintiff: Plaintiff proposes a non-expert discovery cut-off date of January 31, 2018.

Defendant: Assuming that discovery will be limited to Plaintiff's individual claim and Enagic's defenses to that claim, Enagic proposes a non-expert discovery cut-off date of August 31, 2017. If the Court allows Plaintiff to seek discovery related to class certification and to the purported claims of the putative class, Enagic proposes that January 31, 2018 is an appropriate non-expert discovery cut-off date.

L. EXPERT DISCOVERY

Plaintiff: Plaintiff proposes September 12, 2017 as the initial expert disclosure deadline, November 16, 2017 as the rebuttal expert disclosure deadline, and January 3, 2018 as the expert discovery cut-off date.

Defendant: Assuming that discovery will be limited to Plaintiff's individual claim and Enagic's defenses to that claim, Enagic does not anticipate that expert discovery will be necessary. If the Court allows Plaintiff to seek discovery related to class certification and to the purported claims of the putative class, Enagic proposes September 12, 2017 as the initial expert disclosure deadline, November 16, 2017 as the rebuttal expert disclosure deadline, and January 3, 2018 as the expert discovery cut-off date.

Class Certification.

Plaintiff: Each side should be afforded adequate time to depose any expert whose opinions might be offered in support of, or opposition to class certification, so as to assess and to address with the Court whether that opinion meets the requirements of Fed. R. Evid. 702. *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011) (*Daubert* requirements apply to expert opinions offered in support of certification).

To that end, Plaintiff proposes a briefing schedule that will permit each side adequate time to depose any expert whose opinion is offered in support of or in opposition to class certification. Specifically, Plaintiff will move for certification no later than October 13, 2017, and shall make available for deposition any expert whose opinion is offered in support of certification by no later than October 27, 2017.

Plaintiff shall file his reply in support of certification by no later than two weeks after Defendant files its opposition, and the motion shall be set for hearing approximately two weeks after the Reply is submitted to the Court.

Defendant:

Enagic respectfully submits that the Court should deny class certification for the reasons set forth in Enagic's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Class Certification. Accordingly, Enagic does not believe that any discovery related to class certification or the purported claims of the putative class members should be permitted.

Should the Court reserve ruling on Plaintiff's Motion for Class Certification and permit Plaintiff to seek discovery related to class certification and the purported claims of the putative class members, Enagic agrees that the briefing and discovery deadlines proposed by Plaintiff are appropriate.

M. DISPOSITIVE MOTIONS

Plaintiff:

At this time, Plaintiff does not anticipate filing any dispositive motions but reserves the right to do so if discovery reveals the basis for such a motion.

Defendant:

No later than March 24, 2017, Enagic intends to file a Motion to Dismiss for Lack of Subject Matter Jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) on the grounds that Plaintiff lacks standing.

Enagic also anticipates filing a motion for summary judgment shortly after discovery closes.

N. SETTLEMENT/ALTERNATIVE DISPUTE RESOLUTION

Plaintiff:

The parties are unable to reach an agreement at that time, although Plaintiff is open and willing to discuss settlement of this case on behalf of the class.

Defendant:

The parties have not meaningfully discussed settlement of this case. Although Enagic is not opposed to mediation or other settlement discussion, because this case is not a proper class action, Enagic candidly is not optimistic about the prospects of reaching a settlement on a classwide basis.

O. TRIAL ESTIMATE

Plaintiff:

Plaintiff estimates a trial of 6-8days

Defendant:

If this case is limited to Plaintiff's individual claim, Enagic estimates a trial of no more than 1-2 days. If this case proceeds to trial as a class action, Enagic expects that trial will last a minimum of 3-4 weeks due to the myriad individualized issues and defenses that will have to be resolved.

P. TRIAL COUNSEL

Plaintiff:

Plaintiff will be represented by Todd M. Friedman at trial.

Defendant:

Enagic will be represented by Dwight M. Francis at trial.

Q. INDEPENDENT EXPERT OR MASTER

Plaintiff:

Plaintiff does not believe that the appointment of an independent expert or master will be necessary in this matter.

Defendant:

Enagic agrees that the appointment of an independent expert or master will not be necessary.

R. OTHER ISSUES

Plaintiff:

Plaintiff anticipates no unusual issues.

Defendant:

Enagic does not anticipate any unusual issues.

Dated: March 10, 2017

LAW OFFICES OF TODD M. FRIEDMAN, P.C.

By: /s Todd M. Friedman
Todd M. Friedman

Attorneys for Plaintiff
EDWARD MAKARON

Dated: March 10, 2017

By: */s/ Dwight M. Francis*

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CERTIFICATE OF SERVICE

Filed electronically on this 10th day of March, 2017, with:

United States District Court CM/ECF system

Notification sent electronically on this 10th day of March, 2017, to:

Honorable Judge Dean D. Pregerson
United States District Court
Central District of California

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